COURT OF APPEALS
DECISION
DATED AND FILED

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2004AP2727-CR **Cir. Ct. No. 2000CF4666**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH A. RUDOLPH,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and DAVID A. HANSHER, Judges. *Affirmed*.

Before Wedemeyer, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Keith A. Rudolph appeals from a judgment of conviction for five counts of failing to pay child support, and from a postconviction order summarily denying his motion for resentencing.[1] The issue is whether the trial court erroneously exercised its discretion by failing to explain why it imposed the maximum sentence for these offenses. We conclude that Rudolph is judicially estopped from challenging a sentence to which he agreed, and insofar as he seeks resentencing predicated on ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, it does not apply retroactively. Therefore, we affirm.

¶2 Incident to a plea bargain, Rudolph pled guilty to five counts of failing to pay child support for over one hundred twenty days per count, in violation of WIS. STAT. § 948.22(2).[2] In exchange for Rudolph's five guilty pleas, the State recommended imposition of four, two-year consecutive prison sentences, and a three-year consecutive sentence (comprised of one- and two-year respective periods of confinement and extended supervision) stayed in favor of five six-year concurrent probationary terms.[3] At sentencing, defense counsel urged the trial court to follow the State's sentencing recommendation, characterizing it as

[1] The Honorable Dennis P. Moroney imposed and stayed the sentences in favor of probation for these five offenses. When Rudolph's probation was revoked he began serving the sentences originally imposed by Judge Moroney. The Honorable David A. Hansher denied Rudolph's postconviction motion.

[2] Two of these offenses were governed by the 1997-98 version of the Wisconsin Statutes; the other three were governed by the 1999-2000 version. Four of the five offenses preceded the applicability of Truth-in-Sentencing; the most recent offense occurred in 2000, and was thus subject to determinate (truth-in-) sentencing. *See* 1997 Wis. Act 283.

[3] There were numerous conditions of probation including a six-month term in the House of Correction. Rudolph had obtained gainful employment several weeks before the imposition of sentence. Consequently, the State agreed to withdraw that recommended condition of probation to facilitate Rudolph's continued employment.

"reasonable" and "mak[ing] a lot of sense." The trial court then imposed and stayed an aggregate sentence of nine years, followed by a one-year period of extended supervision.[4] Consequently, the trial court imposed a less harsh sentence than that recommended insofar as it imposed only a one-year period of extended supervision, rather than the two years that were recommended.

¶3 The State claims that Rudolph is judicially estopped from challenging a sentence to which he agreed. Rudolph does not dispute that he agreed with the State's sentencing recommendation. Thus, this issue involves applying the law to undisputed facts, and is subject to our independent review. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471, 583 N.W.2d 843 (Ct. App. 1998).

¶4 "The doctrine of judicial estoppel recognizes that 'it is contrary to fundamental principles of justice and orderly procedure to permit a party to assume a certain position in the course of litigation which may be advantageous, and then after the court maintains that position, argue on appeal that the action was error.'" ***Id.*** (quoting ***State v. Gove***, 148 Wis. 2d 936, 944, 437 N.W.2d 218 (1989)). Although this was not presented as a joint sentencing recommendation, Rudolph's counsel ultimately urged the trial court to follow the State's recommendation. During his allocution, Rudolph did not propose a different sentence, or object to the State's recommendation with which his counsel had agreed. This agreement was similar to that which we precluded by judicial estoppel in ***Magnuson***. *See* ***id.*** at 471-72. On appeal, after the State claimed that Rudolph was judicially estopped from challenging the sentence, Rudolph (who did

[4] Only the sentence on the fifth (Truth-In-Sentencing) count was bifurcated to include a period of extended supervision.

not understandably mention judicial estoppel in his brief-in-chief) elected not to file a reply brief, leaving the judicial estoppel contention undisputed. Rudolph is judicially estopped from challenging the sentence. *See* ***id.*** at 471.

¶5 Although Rudolph also challenges the sentence on the basis of ***Gallion***, ***Gallion*** does not apply to sentences imposed before it was decided. *See* ***State v. Trigueros***, 2005 WI App 112, ¶4 n.1, 282 Wis. 2d 445, 701 N.W.2d 54 (citing ***Gallion***, 270 Wis. 2d 535, ¶76). Thus, ***Gallion*** does not apply to Rudolph's sentence.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).